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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of

**TELEPHONE AND DATA SYSTEMS,
INC.**

For facilities in the Domestic Public
Cellular Telecommunications Radio Service
on Frequency Block B, in Market 715,
Wisconsin 8 (Vernon), Rural Service Area

) CC Docket No. 94-11
)
) File No. 10209-CL-P-715-B-88
)
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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

To: Honorable Joseph P. Gonzalez
Administrative Law Judge

**WIRELESS TELECOMMUNICATIONS BUREAU COMMENTS
ON MOTION TO ENLARGE THE ISSUES**

The Chief, Wireless Telecommunications Bureau (Bureau), hereby submits comments on the July 22, 1994, Motion to Enlarge Issues filed by the Settlement Group.¹ Although the Bureau believes that there may be a material and substantial question of fact as to whether Telephone and Data Systems, Inc. (TDS) controls UTELCO, Inc. (UTELCO), the Bureau does find that TDS never intentionally mischaracterized its ownership in UTELCO.

1. The Settlement Group seeks to add an issue as to whether TDS attempted to mislead the Commission or lacked candor in its representations concerning the relationship between TDS

¹ Century Cellunet, Inc., Contel Cellular, Inc., Coon Valley Farmers Telephone Company, Inc., Farmers Telephone Company, Hillsboro Telephone Company, LaValle Telephone Cooperative, Monroe County Telephone Company, Mount Horeb Telephone Company, North-West Cellular, Inc., Richland-Grant Telephone Cooperative, Inc., Vernon Telephone Cooperative, and Viroqua Telephone Company.

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and UTELCO. TDS was an original applicant for a wireline cellular authorization in the Wisconsin 8 Rural Service Area. UTELCO, which although having a wireline presence in the Wisconsin 8 market, was not an original applicant. Twelve of the original applicants and four other wireline companies (including UTELCO) that did not file applications entered into a pre-lottery partial settlement agreement.² TDS was not a party to the partial settlement.

2. After TDS won the initial lottery, the settlement group filed a petition to deny asserting that TDS had a prohibited cross-interest in the settlement group because of TDS's ownership interest in UTELCO.³ At this time, the settlement group believed that TDS controlled 49 percent of UTELCO. See Petition to Dismiss at 4. In its reply to the petition to dismiss or deny, TDS was silent about the control of UTELCO. However, the control of UTELCO was not at that time an issue. The only issue was whether there was a prohibited cross-interest between TDS and the settlement group because of any TDS interest in UTELCO. The arguments raised by the settlement group made it irrelevant whether TDS controlled or merely held an interest in UTELCO.

3. The Mobile Services Division (MSD) found that TDS did not hold ownership interests in more than one application within the meaning of Section 22.921(b) of the Rules. The settlement group filed a petition for reconsideration of this decision. In its petition for reconsideration, the settlement group still believed that TDS controlled 49 percent of UTELCO.

² The members of the settlement group which filed the instant Motion to Enlarge were all members of the partial settlement group.

³ The Petition to Dismiss or Deny was filed by Century Cellunet, Inc., a member of the settlement group. All subsequent pleadings were filed by the settlement group. For ease of reference, references made to the settlement group refer to the group as a whole or any of its individual partners.

See Petition for Reconsideration at 3. Once again, TDS does nothing to contradict the settlement group's belief. TDS did, however, refer to its interest as being "UTELCO's minority stockholder." See Opposition to Petition for Reconsideration at 5. Again, the issue of who controlled UTELCO was not relevant. The settlement group was concerned about any cross-interest between TDS and UTELCO regardless of control.

4. On reconsideration, the Common Carrier Bureau (CCB) found that TDS's ownership in UTELCO did create a prohibited cross-interest. The CCB also found that the settlement group also was in violation of the same cross-interest. The CCB, however, found that it would not be equitable to dismiss TDS's application. The CCB based its equity findings in part on the fact that it believed that TDS did not control UTELCO and TDS, therefore, "could do nothing more than object to UTELCO's entry into the partial settlement group," and that "it was not within TDS's control to prohibit UTELCO from joining the settlement group." See Telephone and Data Systems, Inc. 6 FCC Rcd 270, 271 (Com. Car. Bur. 1991).

5. Both the settlement group and TDS sought review of this decision before the Commission.⁴ For the first time, in its Application for Review, the settlement group raises the issue of "whether . . . TDS is . . . the controlling party in UTELCO." See Application for Review at 5. The settlement group argues that TDS with a 49 percent interest in UTELCO wields effective control because the remaining interest is spread among a number of individuals with less than 10 percent each. In its Contingent Application for Review, TDS makes no arguments about the control of UTELCO, but does state in passing that "TDS holds a 49% interest [in UTELCO],"

⁴ TDS's Application for Review was contingent upon other parties seeking review of the CCB's decision.

and "TDS holds a minority interest [in UTELCO]." See Contingent Application for Review at 2, 8. TDS says nothing to contradict the CCB's finding that it does not control UTELCO. Instead, TDS argues that there exists no prohibited cross-ownership between TDS and UTELCO.

6. The Commission, upon review, reversed the Bureau's finding that TDS's interest in UTELCO violated the cross-interest rules. The Commission found that the cross-interest prohibition does not cover contingent interests created by settlement agreements amongst applicants and non-applicants. Finding that TDS had not violated Section 22.921(b) of the Rules, the Commission did not need to comment or rule on the CCB's equity findings. Therefore, the CCB's conclusion that TDS did not control UTELCO was neither affirmatively reversed nor upheld.

7. During discovery in the instant proceeding, the settlement group uncovered evidence which they argue indicates that TDS may in fact control UTELCO. Because of this newly discovered evidence, the settlement group has sought to add an issue as to whether TDS misrepresented its relationship with UTELCO to the Commission. Upon review of the settlement group's motion and all of the pleadings filed previously, we cannot find that there exists any material and substantial question of fact regarding TDS's representations in this matter.

8. At no time throughout this proceeding has TDS made any definitive statement that it does not control UTELCO. The issue of control of UTELCO was not relevant until the CCB made its equity finding based in part upon its belief that TDS did not control UTELCO. Prior to that point, all arguments were directed towards any TDS interest in UTELCO whether controlling or not. After the CCB made its perhaps erroneous equity finding, TDS did not simply let this decision stand. Instead, although the CCB's outcome was in TDS's favor, TDS filed a

contingent application for review. Although TDS did refute the CCB's finding in any way, TDS also did not perpetuate the CCB's finding in any way. In short, we can point to nothing in TDS's Contingent Application for Review which is false.

9. The Bureau certainly agrees that all Commission licensees have a special duty which extends beyond merely not making false statements, but instead to affirmatively inform the Commission of all necessary facts.⁵ Because of this duty, it can be argued that TDS had an obligation to inform the Commission that the CCB made an erroneous finding about the control of UTELCO. Because TDS did not so inform the Commission, regardless of whether the issue is added, the Bureau wishes to admonish TDS for failing to be more open about the control of UTELCO. But as will be explained below, we do not believe that TDS was intentionally withholding information from the Commission.

10. TDS at all times argued exclusively that there was no cross-interest violation. Therefore, as far as TDS was concerned, control of UTELCO was irrelevant. There can be no denying that control of UTELCO was irrelevant until the CCB made its finding as to control. Therefore, in the first two rounds of pleadings (the pleadings to the MSD and to the CCB), TDS had no obligation to fully disclose or discuss the control of UTELCO. Moreover, based upon our review of those pleadings, we can find no mischaracterizations of actual facts. Although TDS made reference to its 49 percent interest in UTELCO, this is not false. TDS does directly own only 49 percent of UTELCO.⁶

⁵ See, e.g., RKO General, Inc. v. FCC, 670 F.2d 215, 232 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 and 457 U.S. 1119 (1982).

⁶ TDS owns 49 percent of the voting stock of UTELCO and more than 49 percent of the equity. The bulk of the remaining 51 percent voting stock is held in trust. The voting trustee, although a former employee of TDS, is not currently affiliated with TDS. The beneficiaries of

11. The troublesome pleading is TDS's Contingent Application for Review. This was filed after the CCB made its factual finding making control relevant. TDS, however, remained silent as to the accuracy of the CCB's finding. This is noted in the settlement group's Reply to TDS's Opposition to Application for Review. The settlement group notes that TDS had failed "refute the Settling Partners' specific showing in their application for review that the Recon. Order's analysis of the equities in this case is wholly unsupported by, and contrary to, the record in this case." See Reply to Opposition at 3. TDS, by failing to refute the settlement group's arguments about control of UTELCO, therefore, accepted them.

12. While the Bureau believes that TDS should have been more candid about UTELCO's control, and certainly expects more forthrightness in the future, the Bureau cannot say that TDS intentionally attempted to mislead the Commission or misrepresented any facts. Because TDS always believed that control of UTELCO was not relevant, TDS did not make any assertions as to control. The Commission's decision in this matter shows that TDS was correct; control of UTELCO is not pertinent to the issue of whether TDS violated the cross-interest prohibition. Having a good faith belief that control of UTELCO is not relevant, TDS had no reason to discuss control. Accordingly, we cannot say that any material and substantial question of fact exists as to whether TDS misrepresented facts or lacked candor as to the control of UTELCO. Therefore, the Bureau does not support the addition of the requested issue.

the trust, however, (nineteen shareholders with 2.25 percent each) are current or former employees of TDS or its affiliates. Because of the beneficial ownership of the remaining stock by TDS employees and because TDS lists UTELCO as a TDS Company in its own directory, the Bureau agrees that there exists a legitimate question of whether TDS controls UTELCO. Based on the Commission's decision on the cross-ownership issue, however, it is irrelevant whether or not TDS controls UTELCO.

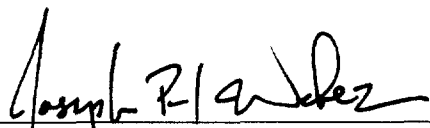
For the foregoing reasons, the Chief, Wireless Telecommunications Bureau, respectfully requests that the Motion to Enlarge be denied.

Respectfully submitted,

Regina Keeney
Chief, Wireless Telecommunications Bureau

December 9, 1994

By:



Joseph Paul Weber
Trial Attorney

CERTIFICATE OF SERVICE

I, Clara Henry do hereby certify that on December 9, 1994, copies of the foregoing Comments on Motion to Enlarge the Issues were served by first-class mail, U.S. Government frank, except as otherwise noted, on the following parties:

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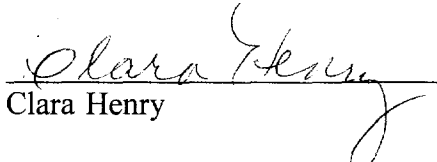
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